Filed 3/23/09 In re M.H. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re M. H., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B206246 (Super. Ct. No. J-1252267) (Santa Barbara County)
THE PEOPLE, Plaintiff and Respondent, v. M. H., Defendant and Appellant.	

M. H. appeals from an order of the juvenile court committing him to the California Division of Juvenile Justice (DJJ) for a maximum term of 16 years based on an offense found true in a sustained Welfare and Institutions Code section 602 petition.[1] The sustained offense is continuous sexual abuse of a child under the age of 14 years. (Pen. Code, § 288.5, subd. (a).) Appellant challenges the DJJ commitment on multiple grounds and also argues that the court abused its discretion in committing him to DJJ, and in selecting the maximum period of confinement. We reverse the DJJ commitment order.

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was born in Guatemala in September, 1990. When he was less than three years old, his parents moved to the United States and left appellant and his younger brother in the care of their paternal grandparents. His parents found employment in the United States and had three more children. Appellant and his brother remained with their grandparents in Guatemala until 2004, when they joined their parents and siblings in Santa Maria, California.

In October 2007, when he was 17 years old, appellant had sexual contact with his eight-year old sister four times. He kissed her, touched her "'ass,' put his 'dick' on her 'ass,'" and moved it back and forth until he ejaculated.

On October 26, 2007, the prosecution filed a section 602 petition alleging three counts of continuous sexual abuse of a minor under the age of 14. (Pen. Code, § 288.5, subd. (a).) The record suggests that a separate section 602 petition was filed alleging that appellant's brother engaged in similar conduct.

On October 29, 2007, the probation department filed a detainment memorandum. The court ordered that appellant remain detained and also ordered a mental health evaluation.

On November 27, 2007, appellant admitted count 3 of the petition. The juvenile court (Hon. James E. Herman) dismissed counts 1 and 2 of the petition and found that its remaining allegations were true.

On December 11, 2007, the juvenile court (Hon. Zel Canter) conducted further proceedings. Because the United States Immigration and Customs Department (ICE) had placed a hold on appellant, the probation report recommended that the juvenile court declare appellant to be a section 602 ward, place him on probation, and release him to ICE for deportation to Guatemala.

The probation department further recommended that absent deportation, the court should grant appellant probation with a high level of supervision and order his placement in a residential sex offender treatment program. Appellant's parents did not meet with the probation department or attend any court hearings. Instead, they

"agreed that they [did] not want to be involved in the Court process and [were] 'leaving the boys in the hands of the law.'" Appellant's counsel proposed continuing the disposition hearing so that appellant could be released to ICE at the same time as his brother.

The court stated that it did not want appellant to be deported so that he could molest little girls in Guatemala. It directed the probation department to find out "what the options [were] for incarceration," including screening for the DJJ. It also asked, "If he were an adult, you wouldn't deport him. He would be in prison, right? So why would he get a break as a juvenile? I just find that ludicrous."

By the time of the December 18, 2007 disposition proceedings, the probation department had submitted an informational report and preliminary comments from Dr. Muriel Yanez, the psychologist appointed to evaluate appellant. Appellant had been screened and accepted by DJJ, at the direction of the court. The probation department explained why it did not recommend that appellant be committed to the DJJ:

"Although the minor was accepted to DJJ, given that this is his first offense and previous services have yet to be tried, coupled with the limited amount of risk factors outside of the instant offense, it does not appear that a commitment is warranted at this time. The information provided by Dr. Yanez serves to reinforce the belief that the minor's needs would best be addressed through a specialized residential treatment facility, which would not only focus on the instant offense, but also provide individual and family therapy to address the minor's own victimization, as well as his tumultuous childhood. It is believed this would be the most appropriate environment to facilitate rehabilitative services. However, given the minor's current immigration hold, viable options for placement are limited. Therefore, Probation continues to recommend that the minor be declared a ward of the Court pursuant to [section] 602 W &IC."

During proceedings on December 18, the probation department representative stated that he would explore residential treatment for appellant rather

than DJJ. Appellant's counsel noted that as indicated in the initial Yanez report, appellant had been sexually and physically abused as a child; he suffered from post-traumatic stress syndrome; and that he was very remorseful and realized that his conduct was very wrong. Without waiting for the full psychological report from Dr. Yanez, the court committed appellant to DJJ for a 90-day diagnostic review.

The Yanez report was filed on January 7, 2007. On January 9, appellant filed a section 778 motion asking that the court modify its earlier order committing him to DJJ for the diagnostic evaluation.

On January 10, 2008, the court suspended its prior DJJ commitment because their diagnostic referral would be too expensive. It stated that testing would be done locally. It also explained that its thinking "in sending him to [DJJ] . . . for a diagnostic was simply in the same vein we send adults to the Department of Corrections for Diagnostic. . . . [I]t just gives the court a chance to review, but . . . he belonged in a locked up facility, a correctional facility, and this – they would just come back and say he fits their program or he doesn't. I didn't really have in mind whether the psychological and sociological reports would lead us to some other program."

The court continued: "I also expressed my concern this was not handled – he wasn't handled as an adult. I mean he is 17. And I'm sure he modeled the behavior for this 14-year-old co-defendant here, his brother, with continuous sexual abuse of a five-year-old child. It is just shocking. [¶] . . . It turns out that . . . this 17-year-old and 14-year-old were physically and emotionally abused by the grandparents in Guatemala while the father and mother lived here in the United States . . . . [¶] So we have quite a problem. Good thing we just didn't put into effect immediately the initial recommendation which was just to deport them, and that would [have sent] them back to an abusive environment with the grandparents. [¶] So for [the] protection [of the] 14-year-old and 17-year-old, they need protection. But they also want to protect young children in Guatemala [and] the United States from his sexual predatory behavior. [[¶] Apparently Dr. Yanez, who filed a report which I have not

[yet] read, finds that pedophilia at age 17 is different from pedophilia is at age 18, and that this can be corrected apparently. That's hard for me to accept on the face of it, but I will read the report and see. I won't prejudge it."

On January 30, 2008, the court held proceedings so that the prosecutor could provide more information about the matter not being in adult court. The parties again discussed the expense of a DJJ diagnostic review. The prosecutor informed the court that because appellant's charge was a section 707, subdivision (b) offense, appellant was eligible to go to DJJ. The court requested closed facility disposition options but indicated that it would consider Dr. Yanez' report.

On February 15, 2008, the court conducted disposition proceedings. The February 15 probation report indicated that Dr. Robert Richey, Psy.D., had concluded that appellant was an appropriate candidate for residential treatment. It reported that the ICE hold had been suspended which facilitated his admission into a residential treatment program outside DJJ. The report indicated that appellant was an acceptable candidate for extra-parental placement, and gave the following explanation of why the probation department did not recommend a DJJ commitment:

"[A]s previously recommended, it is still believed that the minor would best be served with an order to extra-parental placement. A group home with an emphasis on sex offender treatment, which specially focuses on the minor's offense, would best assist in his rehabilitation through counseling, victim awareness services, and continued academic progression. This therapeutic environment will not only focus on the instant offenses, but on the issues associated with the minor's tumultuous and inconsistent upbringing, which according to the psychological evaluation, are important components of the minor's case plan. . . . Furthermore, if the minor were ordered to participate in a residential sex offender treatment program, it would make the question of further psychological and psychosocial testing a non-issue. Typically, group homes conduct their own tests to best place the minor within their own facility and in specific programs. While minors reside in structured group homes they are under consistent supervision, and participate daily in therapeutic programs which

specifically focus on their risk of recidivism and build skills to combat these inappropriate desires."

The probation department sent screening packets to three appropriate residential treatment facilities on February 12, 2008. Because it had not yet received responses by February 15, it sought a two-week continuance to complete the development of an appropriate placement plan. Dearing the February 15 proceedings, the probation representative indicated that he was still recommending that appellant be ordered to "extra-parental placement." Appellant's counsel urged the court to follow that recommendation.

The prosecutor argued that appellant needed sex offender treatment but that he could "walk away at any time" if the court sent him to an unlocked residential treatment facility. He asserted that the "the only place we can guarantee it's going to happen is the Youth Authority [DJJ]."

Apparently referring to the nature of the crime, appellant's counsel stated that while "Youth Authority [DJJ] is certainly an option in a case like this, . . . it's certainly not the best means to rehabilitate this minor." Counsel disputed that there was a flight risk because appellant had no place to which he could flee.

After the court announced its intention to order a DJJ commitment, the prosecutor informed the court that it needed to make findings:

"[Prosecutor]: I believe there's findings the court has to make and probation could prepare those findings for the court's signature.

"The Court: What kind of findings? That there's nothing local that would rehabilitate him, that kind of thing?

"[Prosecutor]: I think that, plus it's not – it doesn't have special needs and things like that.

"The Court: Doesn't have special needs other than language."

The probation department employee in court advised the court that there was a "D.J.J. packet that probation needs to prepare." The court responded,

"All right. Prepare it and I will sign it." The probation employee replied, "We can submit that ex parte." The court responded "All right. Done."

Two weeks later, without conducting further proceedings, the court signed a document that contains several findings, including the following: "3. The Court finds that the minor's mental and physical condition render it probable that he/she will benefit by the reformatory, educational, or other treatment resources provided by the California Department of Corrections and Rehabilitation, Division of Juvenile Justice."

DISCUSSION

Appellant contends that the juvenile court improperly committed him to DJJ because the evidence did not demonstrate a probable benefit to him from the DJJ commitment, or that less restrictive alternatives would have been ineffective or inappropriate, and because the court failed to make a finding of probable benefit to appellant before deciding to send him to DJJ, and failed adequately to consider alternative placements. We agree.

We review the DJJ commitment order in light of the purpose of the juvenile delinquency laws, which "is twofold: (1) to serve the 'best interests' of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and 'enable him or her to be a law-abiding and productive member of his or her family and the community,' and (2) to 'provide for the protection and safety of the public. . . .' [Citations.]" (*In re Charles* G. (2004) 115 Cal.App.4th 608, 614-615.) "To accomplish these purposes, the juvenile court has statutory authority to order delinquent wards to receive 'care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of [the juvenile court law]. . . .' [Citation.]" (*Id*., at p. 615.)

"Under section 202, juvenile proceedings are primarily 'rehabilitative' *(id*., subd. (b)), and punishment in the form of 'retribution' is disallowed (*id*., subd. (e)). Within these bounds, the court has broad discretion to choose probation and/or

various forms of custodial confinement in order to hold juveniles accountable for their behavior, and to protect the public," including commitment to DJJ. (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.)

Respondent claims that the juvenile court found that appellant would probably benefit from a commitment to DJJ and that the finding was supported by substantial evidence, citing the findings in the court's February 29, 2008 order. The record belies this claim. The court made no such finding before February 15, 2008, when it decided to commit appellant to DJJ. On February 15, when the prosecutor mentioned the necessary findings, the court made the following comments: "What kind of findings? That there's nothing local that would rehabilitate him, that kind of thing?" Those comments cast doubt on whether the court even recognized the necessity of finding a probable benefit to appellant from a DJJ commitment before it decided to commit him to DJJ.

Respondent also claims that the court found that appellant would receive sex offender treatment in DJJ and that the prosecutor stated that appellant "needs treatment[,] and the only place we can guarantee it's going to happen is the Youth Authority [sic, DJJ]." This claim is premised on the argument of the prosecutor below rather than evidence. Nothing in the record indicates what sex offender treatment program was available at DJJ, whether it would accept offenders like appellant, whether it had any available space, etcetera. The reports and comments from the probation department consistently recommended that appellant be placed in a "structured group home [where residents] are under consistent supervision, and participate daily in therapeutic programs which specifically focus on their risk of recidivism and build skills to combat these inappropriate desires."

In an appropriate case, a commitment to DJJ may be made in the first instance, without previous resort to less restrictive placements. (See *In re Carl N.* (2008) 160 Cal.App.4th 423, 431-433.) However, before making such a commitment, the court must consider whether less restrictive alternatives are available, and ineffective or inappropriate. (*Id*. at 433.) At the time of the disposition hearing, the

probation department had not received responses from three residential treatment facilities. The court refused to continue the matter so that it could make an informed consideration of that alternative before making its disposition decision.

Respondent also cites the prosecutor's argument that appellant could run away at any time if he were placed in a residential treatment facility as evidence that the court considered and rejected that option because of its ineffectiveness. The prosecutor made this argument without reference to appellant's conduct at juvenile hall or at school, without the benefit of a report from any residential facilities, and without any apparent consideration of the possible availability of monitoring equipment to address the concern that appellant could leave those facilities. This record does not establish that the court considered whether less restrictive alternatives would be ineffective when it made its commitment order.

Appellant further contends that the juvenile court failed to exercise the discretion conferred upon it by section 731, subdivision (c) to determine whether to impose the upper or a lesser term for the offense. That statute provides: "A ward committed to the [DJJ] may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment that could be imposed upon an adult convicted of the offense or offenses that brought or continued the minor under the jurisdiction of the juvenile court. A ward committed to the [DJJ] also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters that brought or continued the ward under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section."

A juvenile court has discretion, based on the facts and circumstances of the case, to set a maximum term of confinement that is less than the adult maximum term. (*In re Carlos E*. (2005) 127 Cal.App.4th 1529, 1542.) Here we must reverse the commitment order for the reasons discussed above. If the juvenile court decides to commit appellant to DJJ after receiving more complete information regarding

alternative placements, it will then have the opportunity to consider and exercise its discretion under section 731, subdivision (c).

The juvenile court's disposition order is reversed. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Honorable Zel Canter, Judge

Superior Court County of Santa Barbara

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